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November 2, 1994

*ADMITTED IN VA ONLY

BY HAND

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: Multiplexed Premium Services
under "Going-Forward" Rules
MM Docket No. 92-266

Dear Chairman Hundt:

As you may know, Encore Media Corporation ("Encore") has been in the forefront of the development of creative and innovative premium service alternatives with its Thematic Multiplex concept. Encore had refrained from joining the sometimes contentious and already overpopulated debate on the "going-forward" rules now under consideration by the Commission.

However, Encore has become aware of recent correspondence from Home Box Office ("HBO") and Viacom International, Inc. (on behalf of Showtime Networks Inc.) which raise important premium service concerns and, in the case of HBO, propose a solution which would have unintended consequences particularly adverse to Encore. Recognizing that you and the other Commissioners probably have heard all too much on the "going-forward" issues, Encore will briefly state its concerns and propose a solution to address them.

At the outset, we share the concerns expressed by HBO and Showtime that any "going-forward" rules should make clear that premium services, which are inherently per-channel services from the perspective of programmers, remain outside the scope of rate regulation. Congress clearly defined "premium services" as "services traditionally offered on a stand-alone, per-channel basis (premium channels like HBO and Showtime)." See H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 79 (1992) ("House Report"). Thus, premium services are those

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services offered and promoted by programmers as per-channel services, and such services are not subject to rate regulation if cable operators offer them in the same way.

Indeed, Congress expressly distinguished such "premium services" from "other programming that cable operators choose to offer on a...per-channel...basis." House Report at 79. Thus, with regard to these "other programming" services (non-premium, per-channel services), Congress directed the Commission "to scrutinize and prevent repricing, retiering, or other alterations of rate structures that could have the effect of evading the purposes" of rate regulation. *Id.* Because Congress never intended to regulate premium services, collective offerings of premium services, which benefit consumers by offering discounts for multiple services, raise no issue of evasion and clearly should remain unregulated as long as each premium service remains available a la carte on the system.

When Congress recognized that premium services were and should remain unregulated, it also observed that "some cable operators are experimenting with 'multiplexing'...the offering of multiple channels of commonly-identified video programming as a separate tier (e.g. HBO1, HBO2, and HBO3)." House Report at 80. Congress intended such "'multiplexed' premium services to be exempt from rate regulation to the same extent as traditional single channel premium services when they are offered as a separate tier or as a stand-alone purchase option." *Id.* Of course, the Commission has implemented the multiplex exemption from the definition of "cable programming service" at 47 C.F.R. §76.901(b)(3). Thus, both the premium service and its multiplexed channels should be treated in the same way -- as unregulated services.

We are particularly concerned with the apparently unintended and harmful impact of HBO's October 6, 1994 proposal (copy enclosed) on Encore and its Thematic Multiplex. HBO has proposed the following clarifying language which would exempt a "collective offering" of per-channel services, including premium and "other" services, if available from any cable operator on August 1, 1993:

A collective offering that contains only video programming available on a per channel or multiplex basis from any cable operator on August 1, 1993 shall not be subject to regulation regardless of when a particular cable system first offers such

collective offering; provided, however, that this provision shall not apply to any collective offering offered by a particular cable system that contains any video programming that was carried by that cable system on such date only as part of the basic service or cable programming service tier.

HBO October 6, 1994 Proposal at 2 (emphasis added).

Although Encore takes no position on HBO's cut-off date for per-channel services generally, Encore opposes any such date as unnecessary and inappropriate for premium services. As set forth above, in order to qualify as a premium service, the service must be "traditionally offered on a stand-alone, per-channel basis." Further, a tier of the multiplexed channels of a premium service, regardless of when launched, is unregulated to the same extent as the primary premium service under the Multiplex Exemption. Thus, a cut-off date which presumably is intended to minimize evasion is irrelevant as to premium services and their multiplexes. HBO's proposal would cause the anomalous result that ENCORE, which was launched and carried as a premium service in 1991, would be unregulated while its Thematic Multiplex Channels, which were developed prior to HBO's cut-off date but not launched until 1994, might be subject to regulation.¹ Such result would be directly contrary to the intent of Congress and to the Multiplex Exemption adopted by the Commission. Moreover, it would undermine the explicit Congressional endorsement of multiplex "experimentation" and the "trend" toward offering multiplex channels. House Report at 80, 90.

With the above concerns in mind, Encore submits the following clarifying language for the Commission's consideration:

Consistent with the clearly-stated Congressional intent, premium services and their multiplex channels, as well as collective offerings of premium services and their multiplex channels, shall not be subject to rate regulation as long as each premium

¹ The ENCORE Thematic Multiplex Channels were launched as follows: ENCORE 2 - Love Stories, ENCORE 3 - Westerns, ENCORE 4 - Mystery on July 7, 1994; ENCORE 5 - Action/Adventure and ENCORE 6 - True Stories on September 1, 1994; and ENCORE 7 - WAM!/America's Youth Network on September 20, 1994.

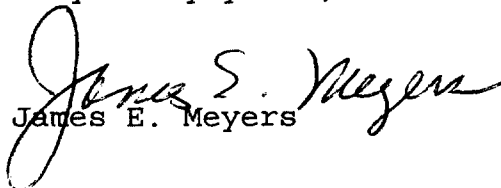
service together with its tier of multiplexed channels is available a la carte. The Commission notes that Congress defined premium services as "services traditionally offered on a stand-alone, per-channel basis (premium channels like HBO and Showtime)."¹

¹ See H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 79 (1992).

Alternatively, if the Commission seeks to define premium and other per-channel services (and collective offerings thereof) as exempt from rate regulation by reference to a date on which they were offered, Encore requests the Commission to clarify that the multiplex channels (qualifying under Section 76.901(b)(3) of the Commission's Rules) of such premium and per-channel services are exempt from rate regulation regardless of the date of launch of the multiplex channels.

Thank you for taking the time to consider our particular issues in a proceeding raising a number of difficult questions. If you have any questions regarding our concerns, we would be pleased to discuss them with you.

Very truly yours,


James E. Meyers

Enclosure

cc: Commissioner Andrew C. Barrett (w/encl.)
Commissioner Rachelle B. Chong (w/encl.)
Commissioner Susan Ness (w/encl.)
Commissioner James H. Quello (w/encl.)
Meredith Jones, Chief, Cable Services Bureau (w/encl.)
William H. Johnson, Acting Deputy Chief for Policy,
Cable Services Bureau (w/encl.)
Jill Luckett, Special Advisor to Comm'r Chong (w/encl.)
Mary P. McManus, Legal Advisor to Comm'r Ness (w/encl.)
Maureen O'Connell, Legal Advisor to Comm'r Quello (w/encl.)
Lisa B. Smith, Legal Advisor to Comm'r Barrett (w/encl.)
Merrill Spiegel, Special Ass't to Chairman Hundt (w/encl.)
William Caton, Office of the Secretary (w/encl.)

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FEDERAL COMMUNICATIONS COMMISSION
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October 6, 1994

Meredith Jones, Esq.
Chief, Cable Services Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Ms. Jones:

I am writing you on behalf of Home Box Office (HBO) concerning the unregulated status of premium service packages under the Commission's going forward proposals. The 1992 Cable Act makes clear that rates for premium channels were not subject to the jurisdiction of the Commission or local governments. The Congress also made clear that an unregulated premium channel that was multiplexed, e.g., HBO1, 2 and 3, retains its unregulated status.

The last sentence of section 76.986(a) of the current Commission rule seeks to formalize this intent and establish a category of historically available stand-alone programs which would remain outside the agency's jurisdiction even if offered in a discounted collective offering.

HBO supports the goal of section 76.986(a) but submits that the following refinements more closely reflect both congressional and Commission intent:

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Meredith Jones, Esq.
October 6, 1994
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A collective offering that contains only video programming available on a per channel or multiplex basis from any cable operator on August 1, 1993 shall not be subject to regulation regardless of when a particular cable system first offers such collective offering; provided, however, that this provision shall not apply to any collective offering offered by a particular cable system that contains any video programming that was carried by that cable system on such date only as part of the basic service or cable programming service tier.

These modifications insure that the scope of the grandfathering in section 76.986(a) applies to any programming that was being offered on a per channel basis within the cable industry as of a prior date certain and is not limited to those per channel programs that a particular system was offering in a collective offering as of such date. Furthermore, it clarifies that a change in the rate, or the addition of a grandfathered channel not previously carried by the operator, does not subject an otherwise unregulated collective offering to regulation, provided that the operator does not modify the collective offering by adding a new non-grandfathered service or a service that the operator was previously carrying on a regulated tier.

Please let me know if you have any questions regarding this suggested clarification to more precisely reflect the intent of the statute and the Commission's current rule.

Sincerely,

A handwritten signature in dark ink, appearing to read 'C. S. Walsh', written over the word 'Sincerely,'.

Charles S. Walsh